appellant sought to reverse or set aside the judgment of the court. How or with what success the appellant would develop his argument was a matter to be determined at the hearing of the appeal. Para 4(1) could not be struck out on the grounds given in the notice of motion.

The notice of motion was accordingly dismissed with costs.

Motion dismissed.

Solicitors: *AL Hussien & Co; Lee & Lee.*

Reported by *Zarinah Marican*

Tan Hung Thiam & Anor v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL APPEAL NO 16 OF 1988
YONG PUNG HOW CJ, CHUA AND KARTHIGESU JJ
23 APRIL 1991

Criminal Law — Murder — Common intention — Prosecution need not prove common intention to commit the offence that is actually committed — Penal Code (Cap 224, 1985 Ed), ss 34 & 304

Evidence — Medical evidence — Murder — Evidence of pathologist — Finding of fact by trial court

Both appellants were convicted in the High Court of having committed murder in furtherance of a common intention. The trial court found that they had both stabbed the deceased in the neck and that the stab wounds were the cause of death. Both appellants appealed against their convictions and disputed the medical evidence of the pathologist as to the cause of death.

Held, dismissing both appeals:

(1) The findings of the trial judges were correct. There was no doubt that both appellants had stabbed the deceased in the neck. The injuries were sufficient to cause death.

(2) In a criminal prosecution where common intention is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s 34 of the Penal Code to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

Cases referred to

1 *Barendra Kumar Ghosh* v *Emperor* AIR 1925 PC 1 (refd)
2 *Mahboob Shah* v *Emperor* AIR 1945 PC 118 (refd)
3 *Mimi Wong & Anor* v *PP* [1972] 2 MLJ 75 (refd)
4 *Mohamed Yasin* v *PP* [1976] 1 MLJ 156 (refd)

Legislation referred to

Penal Code (Cap 224, 1985 Ed) ss 34, 302

MN Swami for the first appellant.
Sant Singh for the second appellant.
Seng Kwang Boon (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chua J (delivering the judgment of the court): The two appellants, Tan Hung Thiam and Ng Siang Hee, were convicted and sentenced to death by the High Court on the charge that they on 11 February 1985, at about 2.35am, at house No 34, Lor 22, Geylang, Singapore, in the furtherance of their common intention, committed murder by causing the death of Ho Hor Song, a female aged 85. They appealed against their conviction. We dismissed the appeals and now give our reasons.

The facts can be briefly summarized. At about 2.41am on the morning of 11 February 1985, in response to a report that there was a robbery, a number of police cars converged on No 34, Lor 22, Geylang, which was a brothel. Bloodstains were observed on the road immediately outside the gates of No 34 and on the concrete forecourt. A number of police officers entered the house by way of the staircase to the reception room on the front upper level. They saw an elderly female Chinese lying motionless, in a pool of blood, in the reception room. Blood trails led along the passageway leading to the back door and the toilet. The door of the toilet was closed but the light was on. A police officer kicked the door open. Inside were found the two appellants. Their hands and clothes were stained with blood. They were arrested.

When the ambulance arrived at 2.45am the ambulance officer pronounced the elderly female Chinese as dead. She was subsequently identified as Ho Hor Song ('the deceased'), the mother of the brothel keeper, Yeo Kim Boon (PW1).

The two appellants were led to separate police cars. Sgt Tan Boon Heng (PW2) asked the first appellant what had happened. The first appellant replied that he would tell Sgt Tan everything.

The first appellant said that his girl friend was pregnant and that he was in financial difficulties. He and the second appellant had been advised by a third man, Lau Ah Chiew, to rob the brothel. During the commission of the robbery the deceased had put up a struggle and the second appellant had stabbed her with a knife. He (the first appellant) had tried to prevent the second appellant from stabbing the deceased and his hand had been cut as a consequence. The second appellant had handed him a black purse and had asked him to throw away the knife outside the premises.

The first appellant then led Sgt Tan to a dustbin at the entrance to the compound of the house. Sgt Tan saw two bloodstained knives in the dustbin. Sgt Tan

retrieved a black purse from the first appellant's trouser pocket. It contained $207. He also found a further $337 in that pocket and the first appellant told him that the money was the proceeds of the robbery. A piece of cloth and a piece of thin yellow nylon twine were also found on the first appellant by Sgt Tan. The black purse was later identified as having belonged to the deceased by her daughter Yeo Kim Boon.

Sgt Tan then proceeded to the police car into which the second appellant had been placed. He asked the second appellant: 'Did you stab the deceased?' The second appellant denied having done so, but admitted that he had struggled with her. Sgt Tan did not pursue the matter further. The two knives were subsequently recovered from the dustbin. One had a narrow blade and a brown handle (P81) and the other a broader blade and a black handle (P82).

At about 3.40am Lau Ah Chiew was arrested in a flat at Dakota Crescent. At about 8.50am both the appellants were referred to Dr Naranjan Singh (PW4), the Medical Administrator of Changi Prison Hospital, for medical examination. The first appellant was found to have a 2cm incised wound over the lower part of his right index finger. The doctor asked the first appellant how it had been caused and the latter replied that it had been caused accidentally by the second appellant when the second appellant was stabbing the deceased.

Dr Naranjan Singh found a 2cm incised wound over the second appellant's left fifth knuckle. In response to a question from the doctor, the second appellant said that this injury had been accidentally caused by the first appellant 'during the incident'.

The first appellant and the second appellant and Lau Ah Chiew were jointly charged for the murder of the deceased. Prior to the commencement of the trial of the first and second appellants, Lau Ah Chiew had been dealt with by another court. This resulted in the charge being amended to the extent only that Lau Ah Chiew was omitted, and the trial of the first and second appellants proceeded on the amended charge.

Statements were recorded by Inspector Lim Kwang Meng from the first appellant and the second appellant on 11 February 1985, in accordance with s 121(6) of the Criminal Procedure Code. The admissibility of the statements was not challenged and they were duly admitted into evidence.

The first appellant's statement (P43C) was as follows:

> I bear no grudge against the old lady. I have no intention of killing her. My intention was to rob her. In fact it was Lau Ah Chiew who suggested that we rob the premises. I went with Ng Siang Hee and Lau Ah Chiew in a taxi. On the arrival at the premises, Lau Ah Chiew pointed to the house to Ng Siang Hee and myself. Before coming to the house, Lau Ah Chiew has given me one hundred dollars for the purpose of renting the brothel and calling a prostitute. Lau Ah Chiew told us to rob a middle aged lady who is a brothel keeper after the door is closed. I wish to say that after Lau Ah Chiew has pointed to the premises, he left. I shared the same room with Ng Siang Hee. Sometime after 2 am, Ng Siang Hee left the room. Shortly I also left the room. I saw Ng Siang Hee covered the mouth of the old lady with his left hand and at the same time he was holding a knife with his right hand and pointed at her stomach. The old lady was seated. I also heard Ng Siang Hee telling the old lady to be quiet. Ng Siang Hee then asked me to bring a piece of cloth to cover the old lady's mouth. I done so. I could not cover her mouth properly as the old lady was moving her head all the time. At this juncture Ng Siang Hee's knife came into touch with the old lady's stomach. I saw blood oozing out. I saw Ng Siang Hee pulling out the knife while the old lady was still struggling and Ng Siang Hee's knife came in contact with my right forefinger. Ng Siang Hee then told me to cut the telephone wire and to take the key to open the door. I cut the telephone wire with my own knife. I then wanted to open the door with a key but could not do so. I then went to the room to take our shoes and when I came out of the room I saw the old lady was lying on the floor. I again tried to open the door and finally succeeded. Both of us then came downstairs. While Ng Siang Hee was putting on his shoes, he asked me to go upstairs to take the knife which was lying beside the old lady. I went up and picked up the knife and came downstairs again. Ng Siang Hee then asked me to throw away the knives. I then threw the two knives into the dustbin. At this juncture I saw a police car arrived. Ng Siang Hee and myself ran back to the premises and hid ourselves in the toilet. The two knives and the ropes were provided to myself and Ng Siang Hee by Lau Ah Chiew.

The second appellant made the following statement (P44C):

> On 10 February 1985 at about 11pm Tan Hung Thiam and myself took a taxi from Jurong to Kallang Airport Hawkers' Centre. On arrival at the hawkers' centre, Tan Hung Thiam gave a telephone call to Lau Ah Chiew. About 10 minutes later, Tan Hung Thiam told me that Lau Ah Chiew has arrived. Both of us then walked to the road to meet him. I saw Lau Ah Chiew handed one hundred dollars to Tan Hung Thiam. Three of us then boarded a taxi and later alighted at the vicinity of Lor 20 Geylang. We then walked to a coffee shop. Tan Hung Thiam bought two bottles of Anchor Beer. After this we walked again. We then came to a house No 34, Lau Ah Chiew then pointed to house No 34 and said that it is the correct one. Both of us entered the premises while Lau Ah Chiew left the place. While we were in the premises, Tan Hung Thiam rented a room and called for a prostitute. We went to the room and we drank the beer. About 5 minutes later, someone knocked at the door and said the prostitute has arrived. Tan Hung Thiam then left the room. About half an hour later, Tan Hung Thiam came back to the room and gave me ten dollars and asked me to buy food. I then went to buy food and came back to the room later.
>
> We drank the beer and ate the food. After eating we rested and I fell asleep. At about 2.10am Tan Hung Thiam woke me up and said it's time to start doing. I took out two knives from a bag and I handed one of the knives to Tan

Hung Thiam. I also took out ropes and three pieces of cloth. After our preparations, I took a cup to the hall pretending to take some ice from the refrigerator. In exact fact I was looking at the premises. I saw an old lady was seated in the hall. I then walked to the refrigerator. The old lady told me that there is no ice in the refrigerator. I then went back to the room. I wish to say that I have earlier placed the two knives, the cloth and the ropes on the bed. So when I came back to the room, Tan Hung Thiam took one knife, a piece of cloth and rope and gave them to me. I left the room closely followed by Tan Hung Thiam. I approached the old lady in the hall and took out my knife and told her not to move and said 'robbery'. I pointed the knife at the old lady's stomach. Following this, I saw Tan Hung Thiam cutting the telephone wire. After this, Tan Hung Thiam came and placed the knife on the old lady's neck and asked for the key. The old lady took out a bunch of keys from her pocket and gave to Tan Hung Thiam. Tan Hung Thiam tried to open the door with the keys but couldn't do so. Tan Hung Thiam then asked the old lady whether that was the correct bunch of keys. Tan Hung Thiam then gave me the bunch of keys. While I was in the process of opening the door I heard the old lady making some noise. At this time, I managed to open the door. I saw Tan Hung Thiam covering the old lady's mouth with a piece of cloth. I then approached them and I noticed the old lady was motionless. Tan Hung Thiam went back to the room to take his and my shoes while I came downstairs. A while later, Tan Hung Thiam came down and gave me my shoes. I saw him throwing a knife into the dustbin. As we were about to leave the premises, we saw a police car. Two of us ran back to the room of the premises. I tried to open the rear door with a key but could not do so. We then hid inside the toilet.

On 15 February 1985, the investigating officer, Inspector Karnam Singh (PW3), showed the first appellant the two knives. The first appellant identified the one with the black handle (P82) as the one with which he had been armed. He also told Inspector Karnam Singh that the second appellant had been armed with the other knife (P81), the one with the brown handle.

The following day, 16 February 1985, Inspector Karnam Singh showed the second appellant the two knives. The second appellant confirmed that he had been armed with the knife with the brown handle (P81) and that the first appellant had been armed with the knife with the black handle (P82).

Dr Clarence Tan, a forensic pathologist at the Department of Pathology, performed a post-mortem examination on the deceased on 12 February 1980. He found one stab wound on the right side of the deceased's neck (stab wound 1) between 7 and 8 cms deep, which had incised through the right internal jugular vein, and another stab wound on the left neck (stab wound 2) between 5 and 6 cms deep, which had incised into the left internal jugular vein and then into the left vertebral artery. There was a third stab wound on the left side of the anterior abdominal wall (stab wound 3) approximately 8 to 10 cms deep, and a number of incised wounds on both hands of the deceased.

In the opinion of Dr Tan the two stab wounds in the neck, which had incised into major blood vessels and resulted in a massive hemorrhage, had caused death.

Under cross-examination Dr Tan said that stab wound 3 could have caused death but in his opinion had not contributed to the fatality.

Dr Tan said that the incised wounds on both the deceased's hands would have been caused by a sharp edged instrument like a knife blade. Taken together they were, in Dr Tan's opinion, consistent with defence type injuries caused by the warding off of an approaching knife blade.

Dr Tan prepared a post-mortem report shortly after his examination of the deceased. It was admitted as exh P38. In his post-mortem report P38, Dr Tan expressed the view that all the three stab wounds 'were consistent with having been caused by a knife probably with a minimum blade length of about 10cm'. In cross-examination he agreed that both P81 and P82 fell within that description.

On 19 October 1987, a few days before the trial was due to commence, Dr Tan was shown for the first time the two knives P81 and P82 and he examined them. In the event, the trial was postponed.

On 29 July 1988, Dr Tan produced a supplementary post-mortem report (P90) based on his examination of the knives and the conclusions he had reached when he carried out the post-mortem on 12 February 1985.

In his supplementary report, Dr Tan concluded that stab wound 1 was more likely to have been caused by the knife blade of P82, the knife which had been held by the first appellant, than by the knife blade of P81, the knife with which the second appellant had been armed.

Insofar as stab wounds 2 and 3 were concerned, Dr Tan's opinion was that these wounds were consistent with having been caused by the blade of P81, the knife which had been held by the second appellant.

In his evidence-in-chief Dr Tan said that considerable force would have been used to cause stab wound 1 and there would have been a definite thrust and that bony structure was traversed. Stab wounds 2 and 3 would have required moderate force, no bone or bony structure having been traversed, but again definite thrusts would have been required.

Both the appellants were called upon to make their defence. Both elected to give evidence on affirmation and called no witnesses.

The trial court summarized the evidence of the two appellants in the grounds of decision (p 20):

> It is fair to say that the oral evidence of both accused, except as regards relatively unimportant details, was rea-

sonably consistent insofar as it referred to events prior to about 2am on the morning of 11 February 1985. Both accused were impecunious. Lau Ah Chiew suggested to Tan that he should rob PW1, the manager of the brothel, and Ng agreed to participate. Lau provided the paraphernalia for the job including the knives P81 and P82, and dropped the two accused close to the brothel at about midnight on 10/11 February. Both accused readily admitted that they had gone to the brothel to commit armed robbery; that they had taken the knives with them; that each of them had been armed with a knife before confronting the deceased, Tan with P82 and Ng with P81; that as a result the deceased was killed, and that money was taken from her which the two accused were to share. The plan had been to rob the brothel keeper, PW1, and not the deceased, and events took an unexpected turn at about 2am when the deceased was seen to be sitting, wide awake, in the reception room, thus presenting an unexpected obstacle in the path of surprising and robbing PW1.

The two accused decided that the deceased should be gagged and bound, and that having been accomplished, the robbery of PW1 would proceed. With their shoes off, their knives in their hands, strips of cloth and pieces of the yellow twine in their pockets, they advanced down the passageway from the room they had been occupying, Ng first with Tan following close behind, towards the deceased as she sat, unsuspecting, in the reception room. Ng reached the deceased first, clapped his left hand over her mouth and, holding his knife close to her abdomen said, on his own evidence, words to the effect: 'Robbery. Don't scream. Don't move.'

From that point the evidence of the two accused diverged.

In essence, the evidence of Tan was that when he reached the reception room, he saw Ng with his hand covering the deceased's mouth. In his other hand, Ng was holding his knife to the deceased's abdomen. She was seated on the sofa shown in the photograph P11. Ng asked Tan to tie up the deceased's mouth. Tan placed his knife on the counter, and gagged the deceased with a piece of cloth. He also tried to tie another piece of cloth over her mouth, but the deceased twisted her head from left to right, and he was unsuccessful. He then saw Ng's knife touch the deceased's abdomen. He did not see the knife entering the deceased's body, but saw it come out, and 'when it came out blood also came out'. When Ng's knife was out of the deceased's body, Ng raised it, and it cut Tan's finger. The deceased was at this time using her right hand in order to try and ward off Ng's knife. Upon his finger being cut, Tan stopped trying to tie up the deceased's mouth. He walked to the counter and used the piece of cloth which he had been trying to tie round the deceased's mouth to wipe his finger, which continued to bleed. Tan then cut the telephone wire at Ng's behest. Tan tried, unsuccessfully, to unlock the front collapsible gate with keys which he found on the counter. Then he went down the passageway to the door at the rear of the premises and tried, again unsuccessfully, to open it. On his way back he stopped at the room he had occupied with the second accused, and put on his shoes. He then returned to the reception room, in time to see Ng supporting the limp body of the deceased as she slumped onto the floor. There was a lot of blood.

Ng handed Tan a purse. Tan then tried, and this time succeeded in unlocking the front collapsible gate, and went downstairs onto the forecourt of the brothel. However, he was instructed by Ng to retrieve the knives and throw them away. He went up the steps again. One knife, that of Ng, was close to where the deceased was lying. He picked it up and then he retrieved the knife he had been using from the counter, and threw the knives into the dustbin shown in P7. He saw that both knives had blood on them when he picked them up.

Ng then told Tan that there was a police car outside the brothel. They ran back into the brothel, and hid in the toilet at the end of the passageway, where they were found by the police and arrested. Tan concluded his evidence in chief by stating that he bore the deceased no ill-will. Throughout the incident he had not inflicted any injury on her. He had had no intention to do so, or of hurting her.

The essential evidence of Ng, insofar as it bore on the events post 2am was this. As he held his left hand over the mouth of the deceased, with his knife pointed at her abdomen, Tan came up alongside him, to his left, and pointed his knife at the deceased's neck. Ng asked Tan to cut the telephone wire. Tan did so, placed his knife at the counter, and then returned to where the deceased was seated. He placed a piece of cloth into her mouth, and then tried to tie another piece around her mouth. He was unsuccessful because the deceased struggled, moving her head and body about.

Having failed to tie the cloth round the deceased's mouth, Tan returned to the counter, picked up his knife, and pointed it at the deceased's neck; Ng was not sure on which side, but he thought the left. Tan then asked the deceased for the keys, and Ng saw that she was bleeding from her neck. She handed the keys to Tan who tried but failed, to open the front collapsible gate. Tan returned to the deceased, pointed his knife at the right side of her neck, told her not to scream and asked her where PW1 was sleeping. The deceased pointed to the front room. Tan then tried for the second time to open the collapsible gate, and this time he succeeded. He returned to a position on Ng's left, and pointed his knife at the right side of her neck, telling her not to scream. The deceased was struggling, and at this point Ng saw blood on Tan's knife. Ng's own knife was pointed at the deceased's abdomen. She was continuing to move her head about, and he could not cover her mouth properly with his hand. As the pressure from his hand lessened, the deceased fell forward and Ng's knife entered the deceased's neck. Ng used his left hand to try and prop the deceased up, and in doing so accidentally cut his finger with it. He put his knife on the floor and with both hands against the deceased's shoulders lowered her to the floor. When she reached the floor, the deceased took out her purse and handed it to Ng.

Ng picked up his knife from the floor. Tan asked him whether they should rob PW1, and he answered in the negative because the deceased had been injured and his hand had been cut. He went back to the room, tossed his knife onto the bed, washed his hands and put on his shoes. Tan told him that the knife had to be thrown somewhere else, and Ng asked Tan to dispose of it. Tan threw both knives into the dustbin.

Ng was taken by his counsel to his s 121(6) statement. In it he had said that Tan had pointed his knife at the deceased's abdomen while he, Ng, was trying to open the collapsible gate. Ng admitted that this statement was untrue. He made it out of anger because he had heard Tan telling Dr Naranjan Singh, who had examined them both at the same time, that Tan's hand had been injured trying to prevent Ng from stabbing the deceased, which was untrue.

The net effect of the evidence of the accused, as to the events after 2am was that Tan claimed that he caused none of the three stab wounds sustained by the deceased, and that he saw the second accused's knife touch, and then emerge from, the deceased's stomach. Ng, on the other hand, conceded to the deceased having fallen forward onto the knife he was holding to her abdomen, but claimed that he had nothing to do with the stab wounds on either side of the deceased's neck, saying that it was Tan who had held his knife, at different times, to both sides of the deceased's neck.

The appeal of the first appellant

It is submitted on behalf of the first appellant that the trial judges had erred in accepting the evidence of Dr Clarence Tan that stab wound 1 could have been caused by the blade of P82, the knife held by the first appellant.

Counsel argues that the trial judges had erred in that in spite of the following facts they accepted the evidence of Dr Clarence Tan:

(a) Dr Tan had in cross-examination admitted that all the three stab wounds could have been caused by P81, the knife held by the second appellant;
(b) Dr Tan, being aware of the seizure of the two knives at the scene of crime, had failed to take any steps to ascertain there and then the knife or knives which could have been used to cause the respective wound or wounds;
(c) Dr Tan had failed to carry out a microscopic examination of the wounds and to have close-up photographs taken of the wounds and the probes to enable him to come to a satisfactory conclusion as to the knife which was used to inflict stab wound 1;
(d) Dr Tan had expressed the view in his post-mortem report P38 that all the three stab wounds were consistent with having been caused by a knife probably with a minimum blade length of about 10cm and had agreed in cross-examination that both the knives P81 and P82 could have caused all three stab wounds;
(e) Dr Tan's supplementary post-mortem report P90 stated as regards stab wound 1:'(b) there was a complete displacement of the knife blade downwards while the knife blade was in its depth of penetration effectively resulting in a lengthening of the wound. However, when this occurs, the edge of the skin wound through which the extension has occurred will usually show notching and this was not seen in the skin wound of the deceased.' Dr Tan had not established the absence of notching in stab wound 1. The trial judges had erred in holding that the notes made by Dr Tan were contemporaneous.

Dr Tan conceded that the conclusions recorded by him in his supplementary post-mortem report P90 were reached some two and a half years after he carried out the post-mortem, but that did not, said Dr Tan, make his conclusions any less valid. So long as he recorded the necessary information 'accurately and meticulously' at the time of the post-mortem, the interpretation of them could be made at any time afterwards.

In cross-examination, counsel for the first appellant drew Dr Tan's attention to the fact that in his post-mortem report P38, he expressed the view that all the three stab wounds P38 'were consistent with having been caused by a knife probably with a minimum blade length of about 10 cm'. Dr Tan agreed that both P81 and P82 fell within that description.

Dr Tan said that at that time he had not been asked to consider whether the wounds had been caused by a particular knife or knives. One of his assumptions might have been that the wounds were caused by the same knife. At that time he did not know how many knives or how many assailants were involved and it would not necessarily have been apparent to him that two knives had been used. All he had been concerned to say at that stage was that the wounds had been caused by a knife of about 10cm in length — for all he knew the wounds could have been caused by knives of this length.

At the outset of a long and thorough cross-examination, Dr Clarence Tan stated that neither at the scene of the crime, which he visited, nor during the post-mortem was he shown any weapons which might have been involved, and he did not ask whether any weapons had been found.

At the post-mortem he had carried out on 12 February 1980, he had not attempted to establish what width of knife had caused the wounds. The usefulness of his forensic examination at the time of the post-mortem was to ascertain as much information as he could in order to try and match it to a particular knife or knives, if asked, at some time in the future. Thus, in his post mortem report P38 he had referred to a minimum blade length as simply one of the features of the knife, in contemplation of that information becoming useful to the police in their investigation.

Dr Tan said that he had first examined the two knives P81 and P82 on 19 October 1987, at the request of the then DPP, some three days before the trial was originally due to commence.

It transpired from further cross-examination that Dr Tan was in possession of a 'form 303', part of exh P38A, when he carried out the post-mortem on 12 February 1985. This form stated that the police had recovered two blood stained knives from the scene of the crime. Dr Tan was asked whether, in the light of his knowledge, he would have been interested in establishing that the two knives could have caused the injuries that he was then examining. Dr Tan's response was that

that knowledge would not have affected his approach to the post-mortem examination. He said it was not his function at that stage to ascertain whether those two knives had been used to inflict the wounds. It was his duty to examine the injuries objectively, and to record his findings as truly and as accurately as possible so that it would be useful for further interpretation. That interpretation had been requested in October 1987, and had resulted in his supplementary report, P90. It would not have made any difference, or rendered P90 more valid, if he had been asked by the police on 12 February 1985, for his opinion as to whether the injuries had been caused by one or other of the two knives in question.

The trial judges in the grounds of decision said (p15):

> Clearly, in order for the conclusions expressed by Dr Tan in P90 to be useful, it was necessary for a number of the observations he made during the post mortem to have been accurate, particularly his observations in regard to the nature of the skin wound, the depth of the wound, and its track.

The trial judges then went on to consider Dr Tan's evidence (p 16):

> Counsel for the second appellant subjected Dr Tan to a vigorous and prolonged cross-examination in an attempt to establish that his findings as to the depth of the wounds were liable to such a degree of inaccuracy as to render them unreliable. In the course of his evidence in regard to this line of inquiry, Dr Tan explained that he established the depth of the wounds by inserting a rounded metal probe into the wound, and then measuring with a ruler the extent to which it passed into the body. That measurement was then checked by dissection, in the course of which the thickness of skin, muscle and other penetrated structures was measured. Allowances were then given for such factors as posture, compressibility of the skin in the area of the body involved, following which Dr Tan would have recorded his findings of estimated depth. In the case of the two neck wounds, his estimates would have been assisted by the fact that the tracks ended very close to bone, and accordingly the end point was not really in doubt.
>
> Dr Tan said that although he was told about the two knives, he was not told that two knives were used. In any event, it is his practice to carry out post mortem examinations without any pre-conceived ideas as to the weapons used. Forensic examination of a wound does not depend on the weapons which may be thought to have been used. It had therefore not been his intention to come to any conclusions as to the actual weapons used when he carried out the post-mortem.
>
> It was later put to Dr Tan at some length, by counsel for the second appellant, that the stab wounds found on the deceased could have been caused either by the deceased's neck coming into contact with a stationery knife held close to her neck; or by the knives and the deceased having moved towards each other. Dr Tan discounted both these possibilities. All three wounds had been actively, and not passively produced. Apart from a passively produced wound being a very rare occurrence, if as counsel suggested, the wounds had been caused in a struggle, the skin was unlikely to have been penetrated so cleanly. Other wounds, such as scratches and abrasions, and perhaps superficial incised wounds, would have been likely. The three stab wounds, said Dr Tan, had been actively caused by a definite thrust of the weapon, the force having been generated by the assailants' body, and having passed along his arm through to the tip of the weapon, where it was concentrated.
>
> Dr Tan agreed that the overlapping of tears on the deceased's blouse and trousers suggested that she was seated when the stab wounds were inflicted, but he was unable to agree that the injuries on the palmer surfaces of both hands were consistent with her having tried to grasp a knife. Such an injury has a distinctive pattern, such as a cut across the palm or at the first joint of the fingers. In the case of the deceased, the randomness of the injuries indicated that the wounds had been inflicted by warding off, rather than grasping. Since the wounds were on both hands, and different parts of them, they were likely to have been caused at different times.
>
> Dr Tan insisted that his omission to carry out a microscopic examination of the wounds, to arrange for close-up photographs of the wound and the probes, and to consult the investigating officer with regard to the width of the knife recovered by the police, did not adversely affect his conclusions at the post-mortem. It was also incorrect, he said, that by concluding in his post-mortem report (P38) that the stab wounds had been caused by 'a knife', when he knew that two knives had been recovered, meant that he was then of the view that the same knife had caused all the stab wounds. Dr Tan pointed out that he had not used the expression 'one knife' but the expression 'a knife', and that in any event it had not been his objective at that time to try and identify the knife used.
>
> Dr Tan reiterated at the conclusion of his cross-examination, in answer to questions from counsel for the first appellant, that stab wounds 2 and 3 could not have been caused by P82, and that all three wounds could have been caused by P81.
>
> Under re-examination, Dr Tan stated that in view of his conclusions in P90, and his evidence which confirmed them, both P81 and P82 had been used to cause the wounds he found on the deceased.
>
> In answer to questions by the court with regard to para (b) of P90 concerning stab wound 1, Dr Tan said that had there been notching present in the neck wounds, it would have been visible to the naked eye. It was safe to conclude, Dr Tan said, in view of the fact that he had not noted down the presence of notching, that none was present.
>
> In view of the absence of notching, it was a remote possibility that stab wound 1 had been caused by P81, and the possibility became even more remote when the angle of the track of that wound was considered. Dr Tan had noted the depth of the stab wound in his notes made during the course of the post-mortem, and although he had cancelled his initial depth measurement for both stab wounds 1 and 2 and re-written the measurements, it was not unusual during the process of an examination to discover an extra length of track. The notes were contemporaneous, and the figures which were last written were the ones that stood.

Dr Clarence Tan is a forensic pathologist of considerable experience. He graduated in 1975, from the University of Singapore, lectured for two years in forensic pathology at the Department of Forensic Medicine at the London Hospital Medical College; he was Regis-

trar, and is now Senior Registrar (Forensic Pathology) at the Department of Pathology, Singapore; and since July 1984 he has been clinical teacher in forensic pathology at the National University of Singapore. He has performed in excess of 3,500 post-mortem examinations, including about 95 post-mortem examinations in homicide cases. He has given expert evidence in the courts of the United Kingdom and Singapore. His standing was not questioned by counsel.

Dr Tan had been thoroughly cross-examined by the defence. The trial judges after carefully considering the evidence of Dr Tan and the evidence of the first appellant accepted the evidence of Dr Tan and found that stab wound 1 was caused by the knife P82, the knife which the first appellant admitted that he, and he alone, had held during the confrontation with the deceased. The trial judges stated in the grounds of decision (p 28):

> We are satisfied that the possibility of this wound (stab wound 1) having been caused by Ng's knife was so remote that there was no reasonable doubt that it was in fact caused by P82. This was the conclusion of Dr Tan in his evidence, although he had been somewhat more circumspect in P90.

Counsel for the first appellant has failed to satisfy us that the trial judges' finding was wrong. Dr Tan's evidence is reliable and credible. We can find no reason to interfere with the trial judges' findings of face with which we agree.

Counsel argues that the trial judges had erred by their failure to give due consideration to the first appellant's statement to Sgt Tan Boon Heng immediately after his arrest that he had no intention to cause any injury to the deceased and that he was not involved in the stabbing of the deceased and that what he did was to prevent the second appellant from stabbing the deceased. The trial judges had also overlooked the evidence of Dr Naranjan Singh that the first appellant had a 2cm incised wound over the lower part of his right index finger and when questioned by the doctor the first appellant had replied that it had been caused accidentally by the second appellant when the second appellant was stabbing the deceased. Furthermore the second appellant had said in evidence that he had heard the first appellant telling Dr Naranjan Singh that he (the first appellant) had sustained the injury whilst he was trying to prevent the second appellant from stabbing the deceased.

Counsel submits that the trial judges had erred in law in finding that the first appellant had (1) stabbed the deceased, (2) had the common intention to commit murder in spite of the evidence that they shared the common intention only to commit robbery but had no intention whatsoever to stab or kill or injure the deceased or anyone else. The trial judges had failed to consider the first appellant's evidence that he was not aware that the second appellant was going to stab the deceased or cause serious injury or death to the deceased. Counsel submits that under s 34 of the Penal Code there must exist a common intention to commit the crime actually committed and that it is not sufficient that there should usually be a common intention to behave criminally. In the present case the common intention was to commit robbery and not murder.

Counsel also submits that the trial judges had erred by holding that the prosecution had established beyond reasonable doubt that the two appellants inflicted injuries which caused the deceased's death and that each of them was stabbing the deceased in the neck intentionally to cause bodily injury to her which was sufficient in the ordinary course of nature to cause death, in spite of the doubt in the evidence of Dr Clarence Tan as to the weapons alleged to have been used to cause stab wound 1, and in spite of the evidence of the first appellant on the surrounding circumstances of this case.

The trial judges said in the grounds of decision that the first appellant was subjected to prolonged and strenuous cross-examination by counsel for the second appellant and by the DPP and they were able to observe him closely over a period of days. In their judgment the first appellant did not tell the truth in crucial parts of his evidence. The trial judges said (p 27):

> Tan lied when he said that, having failed to tie up the deceased's mouth and unlock the front collapsible gate, he went to the rear of the house and tried to unlock the back door. We find as a fact that Tan was present in the reception room throughout the episode which resulted in the deceased sustaining the injuries from which she died.
>
> We also disbelieve Tan's evidence that his hand having been accidentally cut while trying to tie up the deceased's mouth, he moved away from her, and at no time pointed his knife at her. Tan's own evidence was that when he threw the knives into the dustbin both were bloodstained. He tried to explain away the blood on his own knife by saying that it came from the small cut on his finger. He claimed that he could not remember where or when he had thrown the piece of cloth which he used to wipe the blood from his finger. It was not found on him, or on the premises, by the police. No blood was found on the counter where the telephone wire had been cut by him after he sustained the finger injury, and no attempt was made to secure from Dr Naranjan Singh evidence that the injury to Tan's finger was such as was likely to have caused it to bleed profusely.
>
> Most importantly, on the evidence of Dr Clarence Tan, which we accept, we find that the knife which Tan admitted that he, and he alone, had held during the confrontation with the deceased, was the knife which caused stab wound 1, the wound on the right side of the deceased's neck.

The trial judges found that stab wound 1 had been caused by a deliberate thrust and that stab wound 2 and stab wound 3 were caused by the deliberate thrusts by the second appellant of his knife P81.

The trial judges then came to the following conclusion (p 29):

> We conclude that the deceased met her death because, in spite of her years, she prevented the two accused from subduing her and keeping her quiet.
>
> There is a substantial body of evidence to support this finding. Ng said under cross-examination that Tan was only successful in partially inserting a strip of cloth into the deceased's mouth, and there are references again and again in the statements, and in the evidence of both accused, that she prevented the tying of another strip of cloth around her mouth by 'struggling' and 'moving about'. The evidence establishes that the deceased was far from silent during the confrontation.
>
> Under cross-examination by counsel for Ng, Tan was asked whether the deceased kept moving her head and making 'slight noise'. He answered in the affirmative. In answer to a question by the DPP, Tan responded that the deceased was 'trying to say something', and that she tried to scream when Ng removed his hand from her mouth. In his statement D2, made at a time when Tan would have been less aware of the importance of the issue of noise, he said: 'Ng Siang Hee then pointed the knife at the lady's stomach and used his left hand to cover the lady's mouth .... At the same time, he was telling the old lady not to shout. She was trying to shout, Ng Siang Hee then asked me to gag the old lady and tie her mouth quickly'.
>
> In examination-in-chief Ng said that the deceased could not scream because his hand was over her mouth, and under cross-examination by the DPP he said that the deceased only made faint noise. However, when Ng made his s 121(6) statement, he said: 'While I was in the process of opening the door I heard the lady making some noise'. We are aware that Ng acknowledged in his evidence that the passage in which this sentence appeared was untrue; however, we regard it as significant that in this passage he appears to be stating a casual connection between the alleged stabbing of the deceased in the abdomen by Tan and the noise the deceased was making.
>
> Furthermore, in his statement D1, Ng makes no mention whatsoever of having placed his hand over the deceased's mouth when he threatened her initially with his knife and said: 'Robbery do not move and make noise'. Indeed, he states 'the old lady was trying to scream and moving about. I did not physically touch her'.
>
> When Tan first walked towards the collapsible gate in order to open it, he told Ng 'not to allow the old lady to make noise. At this time the old lady was struggling and making noise'. After Tan's second, and succesful attempt at opening the gate, and when he was holding the knife in front of the old lady she was 'struggling and trying to make noise', at which time Tan's knife was already stained with blood, and 'Tan Hung Thiam told her not to make noise'.

The trial judges then made the following findings of fact that (p 32):

(i) both accused went to the brothel on the night of 10 February 1985, with intent to commit armed robbery;
(ii) PW1 was their intended victim;
(iii) the accused were each armed with a knife, Tan with P82 and Ng with P81;
(iv) Each accused intended to use the knife with which he was armed to threaten PW1, neither of them anticipating that she would resist, since Lau Ah Chiew had told them that a mere threat with the knives was all that would be required to persuade PW1 to part with her money;
(v) their plan ran into a snag, the deceased being awake and present in the reception room at about 2am the time at which the two accused intended to rob PW1;
(vi) the two accused decided to gag the deceased at knife point, in the reception room, for which purpose they armed themselves with their respective knives with which to threaten her, and with strips of cloth and lengths of twine to gag her. It is probable (although nothing turns on this) that they intended, having done so, to take her into their room and bind her with a length of sturdy green rope which they had left there for the purpose, and which is to be seen in P19;
(vii) the deceased, despite her age, put up a spirited and entirely unexpected resistance against the attempts of the two accused to keep her quiet. She twisted her head from one side to the other, shifted about, and pushed the knives away with the palms of her hands, resulting in incised wounds to them;
(viii) in their anxiety to silence and subdue the deceased Tan drove his knife into the right side of the deceased's neck with considerable force, and Ng thrust his knife into the left side of her neck, and her abdomen, with somewhat less force. Either of the two injuries to the neck was enough to result in the deceased's death;
(ix) throughout the transaction which resulted in the injuries to the deceased, it remained the common intention of both accused to rob PW1, and the injuries were caused in the furtherance of that common intention;
(x) the taking of the deceased's purse was incidental to the objective of both accused, which was to rob PW1, their original target; and
(xi) when both accused realized that the deceased was seriously, and probably mortally, injured they abandoned all thought of robbing PW1, and attempted to make their escape.

The stab wounds to the deceased's neck inflicted by each of the accused were brought about with the intention on the part of each of them to cause the deceased bodily injury. We regard our conclusion as to the intention of both the accused as inevitable, whether in investigating proof of that intention we apply the principles referred to in *Virsa Singh* v *State of Punjab* AIR 1958 SC 465 at (13) on p 467; or whether we apply the more stringent test preferred by the Privy Council in *Mohamed Yasin* v *Public Prosecutor* [1976] 1 MLJ 156, at p 157D. The intention of both accused is manifest from the conclusions of fact at which we have arrived, and to which reference is made in paragraphs (vii) and (viii) above.

The conclusions of the trial judges were (p 35):

> It follows from our findings of fact that the charge against both accused is made out. The prosecution has established, beyond reasonable doubt, that the two accused inflicted the injuries which caused the deceased's death and that each of them, by stabbing the deceased's neck, intended to cause bodily injury to her which was sufficient in the ordinary course of nature to cause her death. The wounds were inflicted in furtherance of the common inten-

tion of both accused to rob PW1, and a long line of cases, from *Ghosh* v *Emperor* AIR 1925 PC 1 to *PP* v *Neoh Bean Chye & Anor* [1975] 1 MLJ 3, establish that in such a situation s 34 applies.

We reject the submissions of counsel. The findings of fact of the trial judges are correct. There is no doubt that in their anxiety to silence and subdue the deceased the first appellant drove his knife into the right side of the deceased's neck with considerable force, and the second appellant thrust his knife into the left side of her neck, and her abdomen, with somewhat less force. Either of the two injuries to the neck was enough to result in the deceased's death.

We agree with the trial judges' finding that the stab wounds to the deceased's neck inflicted by each of the appellants were inflicted with the intention on the part of each of them to cause the bodily injury to silence and subdue her and the bodily injury inflicted was sufficient in the ordinary course of nature to cause her death.

On the question of common intention under s 34 of the Penal Code, the trial judges relied on a long line of cases. It is clear from the decisions of the Privy Council in *Barendra Kumar Ghosh* v *Emperor*[1] and *Mahboob Shah* v *Emperor*[2] and from the decision of the Court of Criminal Appeal of Singapore in *Mimi Wong & Anor* v *PP*[3] that, in a criminal prosecution where s 34 is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s 34 to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

In *Mimi Wong*'s case,[3] Wee Chong Jin CJ, who delivered the judgment of the court, explained the effect of s 34 of the Penal Code as follows (p 78):

> There is no doubt that for this section to apply there must be in existence a common intention between all the persons who committed the criminal act, and that a criminal act be done in furtherance of that common intention. When these two requirements are proved, each of such persons would be liable for the entire criminal act in the same manner as if he had done it alone.

Wee Chong Jin CJ considered what the Privy Council said in *Mahboob Shah*[2] and *Ghosh*[1] as regards s 34 and concluded (p 79):

> It is clear from the Privy Council's interpretation of the words 'criminal act' that it is the result of a criminal act which is a criminal offence. It then remains, in any particular case, to find out the actual offence constituted by the 'criminal act'. If the nature of the offence depends on a particular intention the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offences constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention.

Wee Chong Jin CJ then gave the following illustration (p 79):

> Thus if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder. Applying s 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly consistent with the carrying out of the common intention and as their 'criminal act', ie that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302, A is also guilty of murder.

The trial judges were correct that it follows from their findings of fact that the charge against both the appellants was made out.

The appeal of the second appellant

The main submission of counsel for the second appellant is on the acceptance by the trial judges of the evidence of Dr Clarence Tan.

His submissions are:

(1) The trial judges erred in interpreting Dr Tan's opinion that the deceased's fatal wounds were 'actively caused by a definite thrust' of a weapon to mean that in law the second appellant intentionally caused the fatal stab wound or wounds.

(2) The trial judges failed to adequately take into consideration in evaluating the opinion of Dr Tan the probability or likelihood that the injuries on the deceased, with particular reference to the fatal injuries, were caused by or contributed to by the deceased's own vigorous struggle with the second appellant and the first appellant.

(3) The trial judges erred in their unreserved acceptance and reliance on Dr Tan's opinion especially in view of the absence of any direct and positive evidence showing how the fatal injuries came to be sustained by the deceased.

(4) The trial judges failed to appreciate adequately or at all that the omission of Dr Tan to carry out a microscopic examination of the wounds, to arrange for close-up photographs of the wounds and the probes, and to consult the investigating officer with regard to the knives recovered by the police adversely affected his post-mortem conclusions and his evidence in court, especially in view of the unre-

served reliance placed by the court on Dr Tan's correlation of the said knives with the fatal wounds sustained by the deceased.

(5) The trial judges failed to appreciate adequately or at all the inherent unreliability of Dr Tan's evidence regarding the correlation of the three stab wounds on the deceased with the knives P81 and P82 wielded by the second appellant and the first appellant respectively especially in view of the fact that the post-mortem report P38 says that all three stab wounds were inflicted by 'a knife' and that under cross-examination, Dr Tan conceded that all three stab wounds could have been caused by P81, the knife wielded by the second appellant.

In our view there is no substance in any of these submissions. We have dealt at length with the evidence of Dr Clarence Tan in our grounds of decision when we were considering the appeal of the first appellant.

The trial judges had carefully considered the evidence of Dr Tan and the evidence of the second appellant and accepted the evidence of Dr Tan and found that stab wounds 2 and 3 were caused by the knife P81; the knife which the second appellant admitted he held during the confrontation with the deceased.

The trial judges said in the grounds of decision that the second appellant was subjected to prolonged and strenuous cross-examination by counsel for the first appellant and by the DPP and they were able to observe him clearly over a period of days. In their judgment the second appellant did not tell the truth in crucial parts of his evidence. The trial judges said (p 28):

> Ng's version, or more correctly his versions, of how the abdominal wound came about are wholly unacceptable to us. The version he gave in court, to the effect that the deceased slumped forward onto his knife was no less credible than the others, and suffered additionally from being the last in time, the first version having been that the abdominal wound was caused by Tan. We accept Dr Tan's evidence that the abdominal stab wound was the result of a definite thrust, and that its characteristics were inconsistent with the deceased having fallen onto a knife. A right-handed assailant, in a frontal assault, would have produced a wound such as stab wound 3, which tracked obliquely inwards, left to right, and slightly upwards. The evidence was that Ng was, at material times, standing in front of the deceased, and it was at no time suggested, in the face of Dr Tan's evidence, that Ng was anything but right-handed.
>
> We accordingly find that stab wound 3 was the result of a deliberate thrust by Ng of the knife, P81, into the deceased's abdomen, and we reject all his versions of how this injury came about.
>
> Stab wound 2, the wound on the left side of the deceased's neck, was of a depth, according to Dr Tan, of about 5 to 6cm. The profile of Tan's knife, P82, the broader of the two knives, was such as to admit to penetration only to the extent of abut 1½ cm, given the length of the skin wound of 3 cm. The fact that the larger knife could not have produced a small wound of that depth, drove Dr Tan to the conclusion that stab wound 2 was consistent with having been caused by Ng's knife, P81. We accept this conclusion of Dr Tan's, and his evidence that this wound, like the other two, had been caused by a deliberate thrust.

Counsel for the second appellant has failed to satisfy us that the trial judges' finding was wrong. Dr Tan's evidence is reliable and credible. We can find no reason to interfere with the trial judges' findings of fact with which we agree.

Counsel submits that the trial judges failed to apply correctly the test laid down by the Privy Council in *Mohamed Yasin* v *PP*[4] in relation to the second appellant's intention when the fatal stab would was inflicted.

Counsel says that the second appellant went to the brothel with the first appellant with intent to commit armed robbery. The second appellant had no intention of causing the deceased any injury. It was when the deceased unexpectedly struggled and when they were trying to subdue her that the deceased sustained the injuries which resulted in her death. The trial judges erred in accepting the evidence of Dr Clarence Tan and found that stab wound 2 was caused by a deliberate thrust.

We reject this submission. As we have said Dr Clarence Tan's evidence is reliable and credible and the trial judges had not erred in accepting the evidence of Dr Tan. Stab wound 2 on the left side of the deceased's neck was of a depth of about 5 to 6cm with a track that was slanted slightly upwards and had incised into the left internal jugular vein and into the left vertebral artery. According to Dr Tan stab wound 2 would have required moderate force and was actively caused and not passively produced. Stab wound 2 could not have been caused accidentally. It is clear that the second appellant intended by stabbing the deceased to cause her some bodily injury of a kind which is sufficient in the ordinary course of nature to cause death.

In the petition of appeal one of the grounds is that the trial judges erred in law 'in imputing to your petitioner, in common with the first appellant, the intention of causing bodily injury to the deceased which was sufficient in the ordinary course of nature to cause her death when the common intention of your petitioner was to rob the deceased and/or PW 1.' Counsel, however, did not address us on this ground which in our view is without merit.

The submissions on behalf of the first and second appellants relate to the weight and reliability of Dr Clarence Tan's evidence. These are matters entirely within the province of the trial judges and it is clear from the grounds of decision that their acceptance of Dr Tan's evidence as that of a reliable and credible witness was not based on any misapprehensions of the evidence or of the law.

There was overwhelming evidence to support the trial judges' findings of fact and on all these facts the trial judges were justified in finding both the appellants guilty of the charge. For these reasons we dismissed the appeals.

Appeals dismissed.

Solicitors: *Swami & Narayanan; Sant Singh & Partners.*

Reported by *Mathavan Devadas*

Wong Phila Mae v Shaw Harold

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 106 OF 1989
THEAN, GOH JOON SENG AND CHAO HICK TIN JJ
22 APRIL 1991

Family Law — Custody of children — Order of court granting joint legal custody of children to both parents varied to give sole legal custody to father — Mother applying to vary order to gain custody of children — Welfare of children — Education of children — Court disinclined to alter order of things which alteration was likely to cause children emotional stress and affect their studies

Civil Procedure — Affidavits — Application for adjournment to file further affidavits to refute adverse allegations made — Whether adjournment should be allowed — Court should allow both sides to put forth all relevant facts.

The appellant and respondent were divorced by decree made absolute on 3 January 1986. Pursuant to the decree nisi, and at an adjourned hearing in chambers on 22 November 1985, the court by consent ordered, inter alia, that the respondent and the appellant be granted joint legal custody of the children with care and control of the children to the appellant.

On 16 March 1989, the respondent applied to vary the order of court of 22 November 1985 to the extent that he be granted sole legal custody of the children, on the ground, inter alia, that the appellant had, without the respondent's consent, kept the three younger daughters in the United States since January 1989, living in a motor-home, instead of bringing them back to Singapore to resume their studies. The application was allowed by the court and the respondent was given sole custody of the three younger children. On 8 July 1989, the appellant applied to vary the order of 21 April 1989 in order to gain custody of the three children. The solicitor for the respondent affirmed and filed affidavits relating to the appellant's second husband. At the hearing of the appellant's application, appellant's counsel sought an adjournment primarily to refute the adverse allegations made against the appellant's second husband in the respondent's solicitor's affidavits. The adjournment was refused as the learned judge felt that the issues were sufficiently clear and more affidavits would not help. The learned judge also refused the appellant's application to vary the order of court of 21 April 1989. [See [1990] 1 MLJ 205.] The appellant appealed.

Held, dismissing the appeal:

(1) An adjournment should have been granted to the appellant to enable her second husband to answer the adverse allegations made in the respondent's solicitor's affidavits. If the appellant's association with him was a relevant factor, it was not unreasonable for the appellant to have requested for an adjournment in order to answer the various adverse allegations made against her husband filed just a few days before the hearing. The point was not whether there was sufficient evidence before the court but whether both sides had been given a fair opportunity of putting forth all the facts before the court to enable it to make up its mind. It would have been in order if the learned judge had disregarded the affidavits of the respondent's solicitor, and then refused an adjournment, as that would have been an exercise of discretion no appellant court would have interfered with, but there was nothing to suggest that he had done that.

(2) Education was a very important aspect in the consideration of the welfare of the children. The unconventional and informal educational method of education which the appellant wanted her children to undergo in the US caused the children to miss almost half a year of formal education in Singapore and this was not in the interests of the children. The children were and are at an age where it is essential that they should be properly guided.

(3) Although it is not disputed that taking a child from an environment he is used to is not necessarily against his long-term interest, it is the circumstances of each case which will determine whether a switch is in the best interest of a child. By the time of the hearing, they had all been placed in schools here and were in the course of settling down in their studies. When the hearing of this appeal came up, more than a year later, all the more so the court felt that the alteration of the order of things was likely to cause the children emotional stress and affect their studies.

Cases referred to

1 *Re L (minor)* [1974] 1 A11 ER 913 (refd)
2 *Sim Hong Boon* v *Lois Joan Sim* [1973] 1 MLJ 1 (refd)
3 *Koh Teng Lam* v *Elsie Koh* [1976] 1 MLJ 103 (refd)
4 *Chan Bee Yen* v *Yap Chee Kong* [1989] 1 MLJ 370 (refd)

Legislation referred to

Women's Charter (Cap 353, 1985 Ed) s 119(2)

Appeal from: Divorce Petition No 755 of 1985 (High Court, Singapore)

Lai Siu Chiu (Ms) (Angeline Yap (Ms) with her) for the appellant.
Harry Elias (Flexie Sion (Ms) with him) for the respondent.

Cur Adv Vult

Chao Hick Tin J (delivering the judgment of the court): This was an appeal against a decision of the High Court refusing the appellant's application to vary an order of court made of 21 April 1989 which granted custody care and control of three children of the marriage between the appellant and the respondent, to the respondent. We dismissed the appeal and now give our reasons.

The appellant and the respondent were married at the Singapore Registry of Marriages on 18 January 1967. They have five children out of the marriage, namely, a son, ie Chai Chian (born on 18 October 1967) and four daughters, Soo Ling, Soo Mei, Soo Wei and Soo Xian